

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

In the Matter of the Complaint)
Against Fred Carl)
)
**SUMMARY OF FACTS
AND
STATEMENT OF FINDINGS**

Senator Jim Elliott filed a complaint alleging that Fred Carl violated Montana campaign finance and practices laws.

SUMMARY OF FACTS

1. Fred Carl was a candidate for District 7 of the Montana State Senate in the 2004 election. His opponent was Senator Jim Elliott. Sen. Elliott prevailed in the election.

2. Following the election Sen. Elliott filed a campaign finance and practices complaint based on a campaign card that was produced by Mr. Carl. Sen. Elliott's complaint alleges that the card misrepresented Sen. Elliott's votes on 4 legislative bills, and also misrepresented the rating assigned to him by the Montana Shooting Sports Association (MSSA).

3. Mr. Carl contends that around the middle of October, 2004, he received some voting records of several western Montana legislators from some "Republicans in Kalispell." Based on the voting records, on October 17, 2004 Mr. Carl created between 30 and 50 post card sized handouts. The handouts contained text on both sides. One side of the card contained a photo of Mr. Carl and the following text:

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Senator Elliott's voting record is worth knowing!

The Montana Shooting Sports Association rated him an "F".

He was on the wrong side of just about every gun owner and sportsman issue.

He voted **against** predator management (HB # 262);

He voted **against** the delisting of wolves (HB # 283);

He voted **against** management of game animal population so as to keep a sustainable habitat for the animals (HB # 42);

He voted **against** requiring Fish, Wildlife and Parks to publish an annual count of game animals (HB # 209);

How can Mr. Elliott say he supports hunting and sportsmen?

Fred is a hunter and a gun owner.

Fred was sponsor of the bill for "hunter orange"!

It's time for a change – vote **Fred Carl** for **State Senator**.

Paid for by Carl 4 State Senate Committee.

The other side of the card contained a photo of Mr. Carl and the following text:

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Senator Elliott's voting record is worth knowing!

Senator Elliott has a measly 70% rating from The National Federation of Independent Business. Yet he professes to be a friend of business.

He voted **against** the bill to reduce our individual Income taxes.

Senate Bill #407 was a bill to reduce our income tax from 11% (the highest in the nation) down to 6.85%.

That same bill included the provision to cut the capital gains tax from 9% down to 4.85%.

His record indicates that he believes in "tax and spend"!

How can Mr. Elliott say he supports the people of Montana with a record of voting against reducing our taxes?

Fred believes in lower taxes and smaller government!

It's time for a change – vote **Fred Carl** for **State Senator**.

4. Sen. Elliott contends that the first side of the card is inaccurate for the following reasons.

- The card states that the Montana Shooting Sports Association rated him an "F," when the Association actually rated him a "B."
- The card states that Sen. Elliott voted against House Bill (HB) 262, involving predator management, when in fact Sen. Elliott voted in favor of the bill.
- The card states that Sen. Elliott voted against HB 283, involving delisting of wolves, when in fact Sen. Elliott voted in favor of the bill.
- The card states that Sen. Elliott voted against HB 42, involving management of game animal population, when in fact he voted in favor of the bill.

- The card states that Sen. Elliott voted against HB 209, which Mr. Carl characterized as a bill that would require the Department of Fish, Wildlife & Parks to publish an annual count of game animals. In his complaint Sen. Elliott pointed out that HB 209 was entitled “Conform period for enforcing lien in another county,” that the bill had nothing to do with game animals, and that it passed the Senate by a vote of 48-0.

5. Sen. Elliott contends that the card does not comply with Mont. Code Ann. § 13-35-225(2) because it does not state the candidate’s party affiliation. He also alleges that the card does not comply with Mont. Code Ann. § 13-35-225(3), because 1) it does not reference a particular vote on which the information is based, 2) it does not disclose contrasting votes on the same issue, and 3) it does not include a verification statement.

6. In his response to the complaint allegations, Mr. Carl explained that he designed the card on his own, after receiving the voting information from the Kalispell Republicans. He did not request the information from the Republicans, but the records were sent to him to assist him in his campaign. Mr. Carl printed between 30 and 50 of the cards using his computer and printer. The cards were never intended to be mailed out, and none of them were mailed out. Mr. Carl stated he handed out less than 30, and probably less than 20 of the cards, at campaign events in Sanders County and in Frenchtown. He did not include the party name or symbol on the cards because he didn’t intend to mail the cards, and everyone knew he was a Republican. After speaking with other candidates in Missoula, Mr. Carl learned that there were errors on

the cards. Once he discovered that there were errors, Mr. Carl discarded the rest of the cards.

7. Mr. Carl then telephoned Rep. Verdel Jackson, House District 6, and informed him of the errors in his campaign card. Rep. Jackson told Mr. Carl that the same voting records had been printed in a newspaper political ad, and that he would look into it. The next day Rep. Jackson telephoned Mr. Carl and confirmed that there were errors in the representations regarding the voting records.

8. Sen. Elliott became aware of the mistakes in Mr. Carl's campaign card when he was given a copy of the card at an event in Plains, Montana.

9. A reporter from the Valley Press newspaper in Plains telephoned Mr. Carl and advised him that Sen. Elliott planned to file a campaign finance and practices complaint. Mr. Carl explained the situation to the reporter and asked the reporter to pass an apology on to Sen. Elliott.

10. Mr. Carl contends that he had no reason to question the accuracy of the voting records that he received from Kalispell.

11. The MSSA rated Sen. Elliott a "B" on its 2004 website listing legislative candidate ratings and endorsements.

12. HB 262, introduced in the 2003 Montana Legislature, was a bill to clarify the Department of Fish, Wildlife & Parks' duties related to predator management. Senator Elliott voted in favor of the bill on both second and third reading. The bill passed and was enacted into law.

13. HB 283, introduced in the 2003 Montana Legislature, was a bill to implement a substitute wolf management plan, and directing the Attorney General to

analyze options related to delisting of wolves and to take certain other actions related to wolf reintroduction. Senator Elliott voted in favor of the bill in every instance where it came before him. The bill was passed and enacted into law.

14. HB 42, introduced in the 2003 Montana Legislature, was a bill to require wildlife management in a sustainable manner. Every recorded vote on the bill in the Senate shows Sen. Elliott voting in favor of the bill. The bill was passed and enacted into law.

15. HB 209, introduced in the 2003 Montana Legislature, was a bill to conform the period for enforcing a lien filed in another county. While the bill was concurred in by a 48-0 voice vote on second reading, the legislative records do not disclose whether Sen. Elliott participated in that vote. HB 209 passed the Senate by a 48-0 margin on third reading, but Sen. Elliott was not listed as one of the senators voting on the bill. The bill was passed and enacted into law.

STATEMENT OF FINDINGS

Mont. Code Ann. § 13-35-225 provides:

Election materials not to be anonymous -- statement of accuracy. (1) All communications advocating the success or defeat of a candidate, political party, or ballot issue through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, poster, handbill, bumper sticker, internet website, or other form of general political advertising must clearly and conspicuously include the attribution "paid for by" followed by the name and address of the person who made or financed the expenditure for the communication. When a candidate or a candidate's campaign finances the expenditure, the attribution must be the name and the address of the candidate or the candidate's campaign. In the case of a political committee, the attribution must be the name of the committee, the name of the committee treasurer, and the address of the committee or the committee treasurer.

(2) Communications in a partisan election financed by a candidate or a political committee organized on the candidate's behalf must state the candidate's party affiliation or include the party symbol.

(3) (a) Printed election material described in subsection (1) that includes information about another candidate's voting record must include:

(i) a reference to the particular vote or votes upon which the information is based;

(ii) a disclosure of contrasting votes known to have been made by the candidate on the same issue if closely related in time; and

(iii) a statement, signed as provided in subsection (3)(b), that to the best of the signer's knowledge, the statements made about the other candidate's voting record are accurate and true.

(b) The statement required under subsection (3)(a) must be signed:

(i) by the candidate if the election material was prepared for the candidate or the candidate's political committee and includes information about another candidate's voting record; or

(ii) by the person financing the communication or the person's legal agent if the election material was not prepared for a candidate or a candidate's political committee.

(4) If a document or other article of advertising is too small for the requirements of subsections (1) through (3) to be conveniently included, the candidate responsible for the material or the person financing the communication shall file a copy of the article with the commissioner of political practices, together with the required information or statement, at the time of its public distribution.

(5) If information required in subsections (1) through (3) is omitted or not printed, upon discovery of or notification about the omission, the candidate responsible for the material or the person financing the communication shall:

(a) file notification of the omission with the commissioner of political practices within 5 days of the discovery or notification;

(b) bring the material into compliance with subsections (1) through (3); and

(c) withdraw any noncompliant communication from circulation as soon as reasonably possible.

The card created by Mr. Carl clearly qualifies as a communication advocating the success of a candidate. The card does not comply with subsection (1) of the statute because it does not include the attribution “paid for by” followed by the name and address of the person who made or financed the expenditure for the communication. In this case the candidate or his campaign financed the expenditure for the communication, therefore the attribution should have included the candidate’s or the campaign’s name and address. Mont. Code Ann. § 13-35-225(1).

The card also fails to comply with subsection (2) of the statute, because it fails to state Mr. Carl’s party affiliation or include the party symbol. Mr. Carl asserts that he did not include that information because he never intended to mail the card, and in any event everyone knew he was a Republican. There is no exception in Mont. Code Ann. § 13-35-225(2) that would excuse a failure to comply with the requirement based on the arguments set forth by Mr. Carl.

In addition, the card fails to comply with subsection (3) of the statute. It does not reference the particular vote or votes upon which the information represented on the card are based. Mont. Code Ann. § 13-35-225(3)(a)(i). The card also does not include a statement, signed by the candidate, stating that to the best of the candidate’s knowledge the statements concerning the opposing candidate’s voting record are accurate and true. Mont. Code Ann. §§ 13-35-225(3)(a)(iii) and 13-35-225(3)(b)(i).

Sen. Elliott’s complaint alleges that the card also fails to comply with Mont. Code Ann. § 13-35-225(3)(b)(ii), because it fails to disclose “contrasting votes known to have been made by the candidate on the same issue if closely related in time.” Regarding

Sen. Elliott's vote on HB 283, involving a wolf management plan and delisting of wolves, Sen. Elliott also sponsored and voted in favor of Senate Joint Resolution (SJ) No. 4 in the 2003 session of the Montana Legislature. SJ 4 requested delisting of the wolf pursuant to the federal Endangered Species Act of 1973. Mr. Carl's card should have included a disclosure of Sen. Elliott's vote in favor of SJ 4.

Finally, while Sen. Elliott's complaint does not allege that Mr. Carl violated any other campaign finance and practices laws, he does allege that there were misrepresentations on one side of the campaign card relating to Sen. Elliott's voting record and the rating assigned to him by the MSSA. As noted in Facts 11 through 15, the representations on the card were inaccurate. Mr. Carl relied on the information that was provided to him without confirming the accuracy of that information.

Mont. Code Ann. § 13-37-131 prohibits a person from misrepresenting a candidate's public voting record or any other matter that is relevant to the issues of the campaign with knowledge that the assertion is false or with reckless disregard of whether or not the assertion is false. The facts established in this case do not support a finding that Mr. Carl knowingly made the misrepresentations on the card. In addition, there is insufficient evidence that Mr. Carl acted with reckless disregard, since there is no clear and convincing proof that he subjectively entertained serious doubts as to the truth of the representations. See discussion in the decision recently issued by this office in the Matter of the Complaint Against Bradley Molnar and John E. Olsen (April 4, 2006). Thus, while Mr. Carl's actions certainly appear to reflected carelessness or negligence on his part, there is insufficient evidence to prove that he violated Mont. Code Ann. § 13-37-131.

CONCLUSION

Based on the preceding Summary of Facts and Statement of Findings there is sufficient evidence to conclude that Fred Carl violated provisions of Mont. Code Ann. § 13-35-225.

Dated this 17th day of July, 2006.

Gordon Higgins
Commissioner